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April 10, 1995

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

In re: CC Docket Number 94-136

Dear Mr. Caton:

Transmitted herewith, on behalf of Telephone and Data Systems, Inc., a party to CC Docket Number 94-136, is its Opposition to the Appeal of Ameritel from the denial of its Petition for Leave to Intervene in that proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Herbert D. Miller, Jr.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Application of ELLIS THOMPSON CORPORATION For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey.	CC Docket No. 94-136

To: The Review Board

OPPOSITION TO APPEAL

Telephone and Data Systems, Inc. (TDS) files herewith, by its attorneys, its Opposition to the Appeal of Ameritel (Ameritel Appeal) from the denial of its Petition for Leave to Intervene in this proceeding (Ameritel Petition).

The Ameritel Petition was filed on February 6, 1995. Timely comments were filed by TDS and the chief, Wireless Telecommunications Bureau on February 15, 1995. On the same day, American Cellular Network Corp. (Amcell) filed an opposition. An opposition was also filed by Ellis Thompson Corporation (Thompson) on February 21, 1995. By *Order* released on March 7, 1995, the Presiding Judge denied the Ameritel Petition (FCC 95M-68). Ameritel filed its appeal on March 27, 1995, twenty days later and well after the date for filing prescribed by Section 1.301 of the Commission's Rules.[1]

Contrary to the position taken in its appeal, the Ameritel Petition was properly denied because Ameritel totally failed to demonstrate either that it was entitled to intervene under Section 1.223(a) of the Rules or that it should be permitted to intervene under Section 1.223(b) of the Rules.

I. It Was up to Ameritel to Establish That it was Entitled to Intervene, and it Failed to Do So.

Under Section 1.223(a), an entity seeking to intervene as of right must file "a petition for intervention showing the basis of its interest." As Ameritel concedes, it is not, and never was, an

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[1] Under Section 1.301, an appeal must be filed within five days of the release of the order complained of.

applicant for the Atlantic City cellular authorization here at issue. Its claim under Section 1.223(a) was based solely on a bare assertion that it was a "successor-in-interest" to another entity, Ameritel, Inc., which had been the fifth selected applicant for the Atlantic City non-wireline cellular authorization. The **only** support for Ameritel's claim to be a successor-in-interest to Ameritel, Inc. was as follows:

> "It should be noted that the petitioner herein, Ameritel, is an Ohio general partnership that is the successor-in-interest to Ameritel, Inc. For ease of reference throughout this pleading, Ameritel will be specified as the original applicant." (Ameritel Petition to Intervene, n. 2).

This was "supported" only by a declaration of Richard Rowley, quoted in its entirety below:

> "I, Richard Rowley, herby declare under penalty of perjury under the laws of the United States of America as follows:
>
> 1. I am a general partner in Ameritel, ('Ameritel'), successor-in-interest to Ameritel, Inc.
>
> 2. I have reviewed the foregoing 'Petition To Intervene' ('Petition') to be filed on behalf of Ameritel with the Federal Communications Commission ('Commission') with respect to the hearing designated by the Commission in CC Docket No. 94-136 in connection with the application of Ellis Thompson Corporation for nonwireline cellular facilities to operate on frequency block A in Atlantic City, New Jersey (File No. 14261-CL-P-134-A-86).
>
> 3. Except for those facts of which official notice may be taken by the Commission, all facts set forth in the foregoing Petition are true and correct of my own personal knowledge and belief."

Neither the Ameritel Petition, nor the associated Rowley Declaration, states any basis whatsoever for Ameritel's conclusion that it had become the successor-in-interest to Ameritel, Inc. As the Presiding Judge correctly observed in denying the Ameritel Petition,

> "Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the non-wireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowleys's assertion." (FCC 95M-68, ¶3).

The Ameritel Appeal fails to address this at all, beyond asserting (but not explaining) its position that it made an adequate showing. Obviously, whether Ameritel is the successor-in-interest to Ameritel, Inc. is a mixed question of fact and law, and Ameritel had the burden of presenting a sufficient factual predicate for its legal conclusion. It failed completely to do so. See *GAF Broadcasting Co., Inc.*, 54 RR 2d 94 and 54 RR 2d 96 (Rev. Bd. 1983).

The cases cited by Ameritel in its appeal do not even suggest, much less hold, that a bare assertion that an entity is a successor-in-interest to a mutually exclusive applicant is sufficient to establish intervention rights. In *Algreg Cellular Engineering et al*, 69 RR 2d 1346 (Rev. Bd. 1991), there was no successor-in-interest question; instead, an original applicant sought, and was granted, party status. Nor did *Elm City Broadcasting v. United States*, 235 F.2d 811 (D.C. Cir. 1956), involve any successor-in-interest question. There, the Commission had improperly refused to allow an entity to intervene, even though it conceded that it was a party in interest (235 F. 2d at 815). Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e), also cited by Ameritel, says that intervention rights may be established by "filing a petition for intervention **showing** the basis" therefor (emphasis added); it does not even suggest that the required basis may be shown simply by alleging a legal conclusion, with no factual support at all. For the Presiding Administrative Law Judge simply to have accepted Ameritel's factually unsupported legal conclusion that it was the successor-in-interest to Ameritel, Inc. would have been an indefensible abdication of his responsibility.

II. Ameritel's Request for Permissive Intervention Was Without Basis.

While Ameritel also claimed that it should be permitted to intervene under Section 1.223(b), its claim was merely that Ameritel, as the successor-in-interest to Ameritel, Inc., has an economic interest in securing the disqualification of Thompson (Petition to Intervene, pp. 4-6). But unless Ameritel is, in fact and in law, the successor-in-interest to Ameritel, Inc. it has no such economic or other cognizable interest and, therefore, has no incentive to play a role in the proceeding. And, as the Presiding Judge stated in denying permissive intervention, "Ameritel does not demonstrate that it will make any specific contribution to the resolution of the designated issue." (FCC 95M-68, ¶6).

III. Even If Ameritel's Untimely Supplemental Materials Were to Be Considered, They Establish That Ameritel is Not the Successor-in-Interest to Ameritel, Inc.

One full month after the Bureau, TDS, Amcell and Thompson had pointed out the apparent deficiencies of Ameritel's Petition, Ameritel tendered a "Response."[2] Ameritel does not claim that it had been unable to present anything in its "Response" as part of its original Petition, and there is no apparent basis for any such claim.

Moreover, accepting as true all of the assertions of fact in the Ameritel "Response," Ameritel has demonstrated that it is **not** the successor-in-interest to Ameritel, Inc. under the Commission's Rules, because its ownership is different by more than fifty percent from that of Ameritel, Inc. The Rawlings affidavit associated with the Ameritel Response states:

> "In April of 1987 AMERITEL (OH) redeemed the stock owned by all of its then current shareholders except for Gene A. Folden, Thomas E. Rawlings, David C. Rowley and Richard D. Rowley (hereinafter collectively called the 'Shareholders')." Rowley Affidavit, p. 2

But Ameritel, Inc. reported in Exhibit 1 to its Daytona Beach, Florida application that, as of February 25, 1986,[3] those named individuals each held a 12.25 percent interest in Ameritel, Inc. Collectively, they held a mere 49 percent, non- controlling, interest. (See Attachment A to the TDS-Bureau February 15, 1995 Comments). The remaining stockholders -- whose interests Ameritel, Inc. redeemed -- owned the remaining and controlling 51 percent. The redemption of the interests of Ameritel, Inc's controlling stockholders also constituted a prohibited transfer of control, which

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[2] By that time, the Presiding Judge had already denied the Ameritel Petition. On March 24, 1995 (three days before Ameritel filed its present appeal), he rejected the "Response" as "inexcusably tardy." (FCC 95M-84, released March 24, 1995). While Ameritel attaches a copy of that "Response" to its appeal, it is not properly before the Board and should be ignored. The appeal is five pages in length; the "Response" is also five pages in length, and has a substantive attachment of three and one-half single spaced pages, consisting of an Affidavit of Thomas E. Rawlings. In view of the five page limit on appeals and oppositions thereto set forth in Section 1.301 of the Rules, the Board should not consider the Ameritel "Response," and the parties should not be required to answer it in their five page Oppositions. TDS nevertheless does so here, briefly. Attachment A to this Opposition attempts to make some sense out of the very confusing Rawlings Affidavit, submitted as an attachment to the Ameritel Response. Little is clear, beyond that the Affidavit raises more questions than it answers about Ameritel's alleged successor-in-interest status. Should the Board consider the "Response" on the merits, TDS asks that it be given an opportunity to address it at greater length than this five page Opposition permits.

[3] This was only 19 days after the Ameritel, Inc. Atlantic City application had been filed on February 6, 1986 and only four days after Ameritel, Inc. came into existence on February 21, 1986, see TDS-Bureau comments, p. 2.

the Commission was never asked to approve, and never did approve.[4] Moreover, it is now clear that Ameritel, Inc. did not even exist as a corporation when its Atlantic City application was filed, see Rawlings Affidavit, pp. 1-2.[5] The prohibited transfer of control in 1987, of a corporation which did not even exist when the Atlantic City application was filed, would prevent grant of either an Ameritel, Inc. **or** an Ameritel application. Therefore, neither Ameritel, nor even Ameritel, Inc. if it still existed, has any economic or other cognizable interest in this proceeding. Neither, therefore, has any right to party status.

Conclusion

For all of the above reasons, the Ameritel appeal should be denied.

Respectfully submitted,

Telephone and Data Systems, Inc.

By /s/ Alan Y. Naftalin
Alan Y. Naftalin

By /s/ Herbert D. Miller, Jr.
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April 6, 1995

Its attorneys

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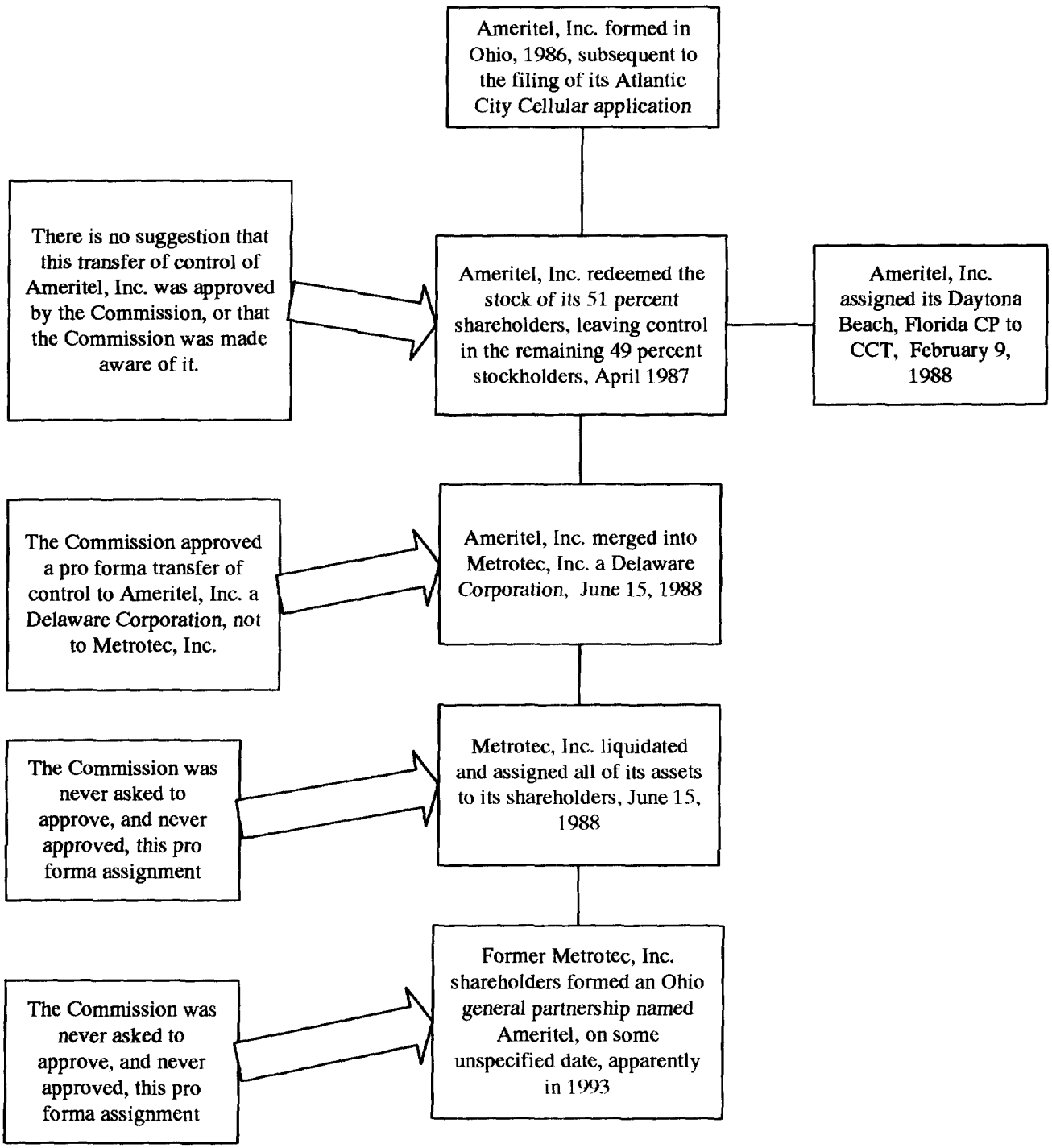
[4] Section 22.23 of the rules, in effect as of April, 1987 when Ameritel redeemed the stock interests of 51 percent of its shareholders, prohibited the transfer of control of a cellular applicant, see Section 22.23(c)(4) and (g).

[5] The failure of an applicant to comply with formation requirements is fatal, see *Cellwave Telephone Services v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994).

Attachment A

Evident Succession of Ameritel, Inc.



Certificate of Service

I, Judy Cooper, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by first class United States Mail, postage prepaid:

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/s/ Joann Leath
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* By hand

April 6, 1995